

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Socorro Vidal Colin,

Petitioner,

v.

Juan Torrie,

Respondent.

Case No.: 16-cv-01403-BEN-AGS

**REPORT AND RECOMMENDATION
TO DENY MOTION FOR STAY AND
ISSUE AN ORDER TO SHOW CAUSE**

Petitioner Socorro Vidal Colin filed a motion to stay her pending habeas corpus petition under 28 U.S.C. § 2254, to permit her to exhaust her state remedies on unidentified claims. Respondent filed an opposition, but Colin chose not to file a reply. For the reasons that follow, this Court recommends that her motion be denied and that an Order to Show Cause be issued requiring Colin to explain why her petition should not be dismissed as untimely.

I. BACKGROUND

On August 22, 2013, a San Diego County Superior Court jury found Colin guilty of possession of heroin for sale, two counts of felonious child abuse, and possession of methadone. She appealed that conviction, claiming her *Miranda* rights were violated, but the California Court of Appeal rejected that argument and affirmed on November 7, 2014. The California Supreme Court denied Colin's petition for review on January 14, 2015.

1 Colin then signed her habeas petition on June 3, 2016, and filed it five days later. In it,
 2 Colin again argues that her *Miranda* rights were violated, but also raises a number of other
 3 arguments that she admits were never presented to the California state courts. Thereafter,
 4 Colin filed the current motion, requesting to stay her petition while she exhausts her state
 5 remedies as to unidentified claims. She does not explain why she failed to exhaust those
 6 remedies earlier.¹

7 II. DISCUSSION

8 The exhaustion of available state remedies is a prerequisite to habeas corpus relief
 9 under 28 U.S.C. § 2254(b). In *Rose v. Lundy*, 455 U.S. 509 (1982), the Supreme Court
 10 held that “a district court must dismiss habeas petitions containing both unexhausted and
 11 exhausted claims.” *Id.* at 522. Such a dismissal leaves “the prisoner with the choice of
 12 returning to state court to exhaust his claims or of amending or resubmitting the habeas
 13 petition to present only exhausted claims to the district court.” *Id.* at 510.

14 When *Lundy* was decided, there was no statute of limitations for filing a federal
 15 habeas corpus petition; after exhausting claims in state court, a petitioner could return to
 16 federal court “with relative ease.” *Rhines v. Weber*, 544 U.S. 269, 274 (2005). But the
 17 Antiterrorism and Effective Death Penalty Act of 1996 added a one-year statute of
 18 limitations for bringing a habeas petition in federal court. *See* 28 U.S.C. § 2244(d). In
 19 *Rhines*, the Supreme Court recognized petitioners can effectively be denied the opportunity
 20 for collateral review “[a]s a result of the interplay between AEDPA’s 1-year statute of
 21 limitations and *Lundy*’s dismissal requirement.” *Id.* at 275. Therefore, the Court held that
 22 federal judges have discretion to stay mixed petitions and hold habeas proceedings in
 23 abeyance while the petitioner returns to state court to exhaust all claims. *Id.* But the Court
 24 also held that a stay and abeyance “should be available only in limited circumstances.” *Id.*

25
 26
 27 ¹ Neither party suggests that Colin litigated post-conviction proceedings with the
 28 California state courts. According to the California Supreme Court’s website, she has not
 filed a habeas corpus petition there.

1 at 277; *see also Blake v. Baker*, 745 F.3d 977, 981-82 (9th Cir. 2014) (“[R]outinely granting
 2 stays would undermine the AEDPA’s goals of encouraging finality and streamlining
 3 federal habeas proceedings.”).

4 A *Rhines* stay is available only in the limited circumstance that: (1) there is good
 5 cause for failing to exhaust the claims in state court; (2) the unexhausted claim(s)
 6 potentially have merit; and (3) the petitioner was not intentionally dilatory in pursuing the
 7 litigation. *Rhines*, 544 U.S. at 278.

8 Colin fails to satisfy the first or second condition. She provides no explanation for
 9 her failure to exhaust her claims in state court, much less good cause. Moreover, the State
 10 persuasively argues that her claims are likely time-barred, regardless of what happens in
 11 state court. Because Colin did not seek certiorari with the U.S. Supreme Court after the
 12 California Supreme Court denied her petition on January 14, 2015, her conviction became
 13 final for the purposes of the AEDPA’s statute of limitations 90 days later, when the
 14 certiorari period lapsed. *See Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999).
 15 Accordingly, the one-year time period began to run on April 14, 2015, and expired one
 16 year later in April 2016. Yet, as noted above, she filed the instant petition nearly two
 17 months later, on June 8, 2016, without ever suggesting that any tolling doctrine applies.
 18 So, regardless of whether she returns to state court to exhaust her state remedies, all of her
 19 claims are untimely.

20 Colin has one last refuge, however: the Ninth Circuit permits a second form of stay,
 21 the so-called *Kelly* stay. *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002); *see generally King*
 22 *v. Ryan*, 564 F.3d 1133, 1139-41 (9th Cir. 2009) (discussing the validity of the *Kelly*-stay
 23 procedure after the Supreme Court’s *Rhines* opinion). A *Kelly* stay is available when a
 24 petitioner dismisses all unexhausted claims, stays the federal case as to the exhausted
 25 claims, then pursues exhaustion in the state courts, and finally, after exhausting all
 26 outstanding claims, amends the federal petition. *See Kelly*, 315 F.3d at 1070. But where,
 27 as here, the exhausted claim is untimely, a *Kelly* stay would be futile. Even if Colin
 28 successfully exhausted her unidentified remaining claims, they would simply relate back

1 to a time-barred petition. *See Figueroa v. Lea*, No. 12-CV-2882 BEN, 2014 WL 1028500,
2 at *7 (S.D. Cal. Mar. 17, 2014) (“Even if the unexhausted claims relate back to the petition
3 . . . , since the petition itself is untimely, a stay under *Kelly* would still be futile.”); *see also*
4 *Richson v. Biter*, No. CV 14-7276-SJO, 2015 WL 5031916, at *9 (C.D. Cal. Aug. 24,
5 2015). Thus, even if Colin requested the *Kelly*-stay procedure—which she has not—it
6 would be unavailing.

7 **III. CONCLUSION**

8 For the foregoing reasons, this Court recommends that Colin’s motion for stay be
9 denied and an order to show cause be issued requiring Colin to explain why her petition
10 should not be dismissed as untimely.

11 Dated: December 23, 2016



12 _____
13 Hon. Andrew G. Schopler
14 United States Magistrate Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28